SUPREME FINANCE (M) BHD.

v.

CHANDAN DAYA SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. F31-3899-1986]
14 FEBRUARY 1990

LAND LAW: *Charge - Default by chargee - Interest of third party purchaser - Actual notice - Registration - Indefeasibility - Principles on which interest can be varied - Not party to charge documents - Equitable interest - Nature of incumbrance - National Land Code 1965, s. 340 - Civil Law Act 1956, s. 11(a).*

Under s. 256 of the National Land Code 1965 (NLC), the plaintiff 'S' sought an order for the sale of the said land with 16 units of apartments erected thereon, which was charged to it by 'C', the defendant registered proprietor . The charged was in relation to a loan of RM2.2 million by S to C; C defaulted on the loan.

Four of the sixteen units which had been erected (5A, 5B, 8A and 8B), were purchased by individuals and companies who had obtained end-financing through S and were therefore excluded from the order of the Court. The purchasers of three units intervened to oppose the application for the sale of land and the 12 units; these purchasers relied on their respective sale and purchase agreements. These purchasers relied on Clause 30 as to the opening of a separate account by S in relation to C if there came into existence new incumbrances.

Held:

[1] There is a clear express term in the charge annexure entitling the plaintiff to charge 20% p.a in respect of the default payment of the loan and the accrued interest. Under the circumstances the proviso (a) to s. 11 of the Civil Law Act 1956 can have no application to the contractually agreed interest rate. At any rate proviso (b) to that section has clearly provided that the said section does not apply to debts where the interest is payable as of right whether by virtue of an agreement or otherwise.

[2] The plaintiff could raise the prescribed rate of interest with retrospective effect because in approving the defendant's application for an extension the plaintiff allowed it on condition that the prescribed rate be increased to 15% as from the date when the defendant should under the charge Annexure have repaid the loan and this condition is not inconsistent with Clause 3 of the charge annexure.

[3] Applying the legal principle in *Ong Chat Pang's* case, all the intervenor has acquired is "an equitable interest of a contractual nature in the land" as against the defendant but such interest is no good against the plaintiff chargor.

[4] (a) The sale and purchase agreement executed between the intervenor and the defendant does not and cannot create an incumbrance in the land since the right of the intervenor is an equitable interest of a contractual nature in the land which only affords him a caveatable interest. Such a right does not attach to the land.

(b) Reading this Clause 13 with Clause 30 it clearly suggests that the incumbrance referred therein relates to an incumbrance in the nature of an easement or entry of a caveat.

(c) The intervenor is not a party to the charge annexure and he cannot rely on the said Clause 30 to sustain his right under the sale and purchase agreement.

[5] The plaintiff being a registered chargee, has attained an indefeasible title against the world under s. 340 of the National Land Code. As there is no fraud, misrepresentation or any of the matters stated in subsection (2) of that section, the intervenor's right (if any) is subservient to that of the plaintiff.

[6] The only recourse which the intervenor has is to sue the defendant for the recovery of the purchase prices of the two apartments which were bought from the defendant. He has no right to interfere with the plaintiff's present application.

[Defendants objection to sale of the said land dismissed. Objections of intervenor dismissed.]

Cases referred to:
Bachan Singh v. Mahinder Kaur & Ors. [1956] MLJ 97
Ong Chat Pang & Anor. v. Valliappa Chettiar [1971] MLJ 225
Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Anor. [1989] 1 CLJ (Rep) 1
Trengganu State Development Corp. v. Nadefinco Ltd. [1982] 1 MLJ 365

Legislation referred to:
National Land Code 1965, ss. 256, 340
Civil Law Act 1956, s. 11

Other source referred to:
Stroud's Judicial Dictionary 5th Edn., Vol. 3 at p. 1273

For the plaintiff - T.P. Loy; M/s. Cheang & Ariff
For the defendant - K.N. Lau; M/s. Soo Thien Meng & Shahrizat
For the intervenor - Grace Dhillon; M/s. Dhillon & Co.

JUDGMENT

Lim Beng Choon J:

On 26 November 1988, Supreme Finance (M) Bhd., the plaintiff filed an originating summons seeking an order for the sale of the land held under Lot 55 Sek. 95 C.T. 11533 Bandar Kuala Lumpur (the land) with 16 units of apartment erected thereon charged to it by Chandan Daya Sdn. Bhd., the defendant who is the registered proprietor of the land. The application is made pursuant to s. 256 of the National Land Code (the NLC).

In the affidavit in support of its application the general manager of the plaintiff company affirmed on 24 November 1986 (encl. 2), it is alleged that the defendant executed the charge over the land in favour of the plaintiff *vide* Presentation No. 8622/82 Jilid 255 Folio 174 which was registered with the relevant Land Office on 19 April 1982 to secure the repayment of a loan of RM2.2 million granted by the plaintiff to the defendant. The charge instrument in Form 16A with the annexure is appended as Exh. 'LFJ1'. The defendant failed to pay the loan with the accrued interests despite that the period for repayment had been extended three times and the last date of settling the loan and the interest was 13 May 1985. As a result the plaintiff through its solicitors issued the statutory notice in Form 16D to the defendant requiring the latter to remedy the default within 14 days of the receipt of the said notice failing which the plaintiff would apply for an order of the sale of the land. In the affidavit it is also stated that 16 units of apartments had been built on the land. Four of the 16 units namely units 5A, 5B, 8A and 8B had been purchased by individuals and companies who had obtained end-financing through the plaintiff. The four units are as such excluded from any order made by the Court for the sale of the land and the other units of apartment.

It is also stated that the plaintiff had not given any undertaking to any other person a forbearance to foreclose on any of those other units of apartments. The outstanding sum secured by the charge was RM2,006,297.58 as at 7 August 1986 with further interest thereon at an additional daily interest of RM921.41 or 20% p.a. of the outstanding sum.

The defendant opposed the plaintiff's application for sale of the land on the ground that it did not owe the plaintiff the amount claimed. It also alleged that the plaintiff was not entitled to claim interest at the rate of 20% p.a. and that the statutory notice in Form 16D was defective (see the affidavit of the director of the defendant company in encl. 13).

In the meantime three purchasers of three units of the apartment applied to intervene in order to oppose the plaintiff's application for the sale of the land and the 12 units of the apartments. As the documents namely their respective sale and purchase agreements relied by them to oppose the application and the grounds of objection are identical, I need only deal with one of the intervenor's application namely that of James Edward Buxton who together with one Elizabeth Buxton purchased apartment 2A. James Edward Buxton (Buxton) is also the lawful executor of the estate of Elsa Constance Radcliff (deceased) who was the purchaser of apartment 2B (deceased purchaser) and Buxton is opposing the plaintiff's application in respect of the sale of apartment 2B in his capacity as the executor of the Estate of the deceased purchaser. The apartment 2A is said to have been purchased from the defendant on 26 June 1984 and the sale and purchase agreement was executed between Buxton and the defendant on the same date. The sale and purchase agreement of apartment 2B was executed between the deceased purchaser and the defendant on 30 August 1984. The full purchase price of RM205,000 in respect of each apartment had been fully paid up by Buxton to the defendant on 30 October 1984.

From the affidavit of Buxton affirmed on 17 May 1989 (encl. 24) and the submission of his Counsel, the contention of the intervenor is grounded on the obligation imposed on the plaintiff pursuant to Clause 30 of the charge annexure which reads:

> 30. It is hereby agreed that if the chargor(s) (or any one or more of them) shall execute or create any further or subsequent charge mortgage or incumbrance over the said land hereby charged or any part or parts thereof in favour of any other corporation person or persons of which the lender shall receive notice either actual or constructive the lender may on receiving such notice forthwith open a new or separate account with the chargor(s) in its books and if the lender does not in fact open such new or separate account the lender shall nevertheless be deemed to have done as at the time when the lender received or was deemed to have received such notice (hereinafter called the "time of notice") and as from and after the time of notice all payments in account made by chargor(s) (or any one or more of them) to the lender shall (notwithstanding any legal or equitable rule of presumption to the contrary) be placed or deemed to have been placed to the credit of the new or separate account so opened or deemed to have been opened as aforesaid and shall not go in reduction of the amount due by the chargor(s) to the lender at the time of notice. Provided always that nothing in this clause contained shall prejudice the security which the lender otherwise would have had hereunder for the payment of the moneys costs charges and expenses herein this charge referred to notwithstanding that the same may become due or owing or be incurred after the time of notice.

The facts relied upon in support of the intervenor's contention is that firstly the plaintiff had at least constructive notice if not actual notice of the purchase of apartment 2B by the deceased purchaser from the defendant since the solicitors, M/s Chooi & Co., who acted for the deceased purchaser in the sale and purchase transaction were the solicitors acting for the plaintiff in the charge transaction. That being the case since the plaintiff had notice of

the incumbrance executed or created by the defendant in the form of the sale and purchase agreement of apartment 2B, the plaintiff would have or at least deemed to have, pursuant to the said Clause 30, opened a new separate account with the defendant in its books and all payments in account made by the defendant to the plaintiff should be placed or deemed to have been placed to the credit of the new or separate account and should not go in reduction of the amount due by the defendant to the plaintiff. Bearing in mind that the full purchase price of apartment 2A and 2B had been settled on 30 October 1984 and from the affidavit of the plaintiff (encl. 2) four payments were made by the defendant to the plaintiff at diverse dated in 1985 amounting to over RM1.8 million, the full purchase prices paid by the intervenor must have formed part of the RM1.8 million paid to the plaintiff. In other words the purchase prices of apartments 2A and 2B had been paid to and received by the plaintiff. In the result the plaintiff has no right to get an order for the sale of the said apartment for it would amount to obtaining double recovery of the prices of the said apartments and this said the intervenor is a perpetration of fraud on the estate of the deceased purchaser as well as the intervenor.

The intervenor in the aforementioned affidavit also contended that the deceased purchaser had at all times been given to believe that the defendant had obtained consent of the plaintiff to sell the apartments to the intervenor pursuant to Clause 13 of the charge annexure prior to the sale of the apartments. As the plaintiff had agreed to the sale of the apartments 2A and 2B, it should upon receipt of the purchase prices of these two apartments, afford due exemption against foreclosure in respect of the two apartments instead of only granting exemption to the individuals to whom the plaintiff had furnished end-financing to buy the apartments 5A, 5B, 8A and 8B.

The Counsel for the plaintiff, however, submitted that Clause 30 of the charge annexure could not apply as the plaintiff was in no position to know when and how much of the purchase prices of apartments 2A and 2B were paid to the defendant. For that matter, the plaintiff would not be able to know the payment of the purchase price of any of the several units of the apartment by the purchasers to the defendant. In any event as the intervenor himself had admitted that his application for end-financing made by him to the plaintiff was rejected he should have made some inquiry before paying the balance of the purchase price to the defendant. If the intervenor was saying that the plaintiff was holding the purchase price in trust, he should sue the plaintiff for the recovery of the money instead of applying to interfere with the plaintiff's application to sell the land and the apartments built thereon. On the question of interest, the Counsel relied on the case of *Trengganu State Development Corp. v. Nadefinco Ltd.* [1982] 1 MLJ 365 to support his contention that as the plaintiff had a contractual right to charge overdue interest, s. 11 of the Civil Law Act 1956 could not supercede the contractual right.

I shall deal with the overdue interest first as this matter can be disposed of without difficulty. Under Clause 1 of the charge annexure it is stated:

> 1. The chargor(s) will on demand pay to the Lender:
>
> (1) the said sum of Ringgit two million two hundred thousand (RM2,200,000) (hereinafter referred to as the "Loan" which expression shall include wherever the contract so permits any balance or part thereof) together with interest thereon (as well) **after or before any order or judgment**) at the rate of fourteen per cent (14%) per annum with yearly rests (hereinafter referred to as the "prescribed rate" which expression shall include where and when applicable **such other rate as may from time to time be substituted** therefore in the manner hereinafter provided). (Emphasis is mine).

Clause 2(1) thereof says:

> If and when the loan shall be demanded as aforesaid or shall otherwise be required to be settled the monies owing by the chargor(s) to the lender shall be ascertained by the lender and when such monies shall be ascertained the chargor(s) agree(s) that the statement of the manager, assistant manager, sub-manager accountant or any other officer of the lender as to the amount of the monies in respect of the loan to be paid **shall** be final and conclusive (Emphasis is mine).

The plaintiff is also entitled at any time from time to time to vary at its discretion such rate of interest by serving a notice in writing on the defendant pursuant to Clause 3 thereof, while Clause 5 deals with additional interest in this way:

> In the event that the chargor(s) shall default in the repayment towards the principal amount of the loan or any part thereof or in the payment of any interest...the chargor(s) shall pay damages by way of additional interest of five per cent (5%) per annum over and above the prescribed rate on the sum in arrear calculated from the date of default to the date of actual payment.

From the affidavit of the general manager of the plaintiff company it is stated in para. 12 thereof (encl. 2) that by letter dated 5 May 1983 "the plaintiff pursuant to (the) agreement informed the defendant that the prescribed interest rate would be 15% per annum with effect from 13 November 1982.

I shall now turn to the *Trengganu State Economic Development Corporation* case mentioned earlier where some useful propositions have been raised by Salleh Abas FJ who heard the case. In his judgment Salleh Abas FJ firstly considered the reason for charging interest and said at p. 368 paras. F-H:

> Interest is a sum of money representing the return for the use or the compensation for the retention by one person of a sum of money belonging to or owed to another. In essence it is regarded as representing a profit which the other person might have made if he had the use of the money or conversely the loss which he had suffered because he had not that use. In other words interest is a compensation for the deprivation of the use of money, which he is lawfully entitled to. (per Lord Wright in *Riches v. Westminister Bank Ltd.*). As a result of almost two centuries of development by the common law Courts and the Courts of equity and also by Acts of Parliament it has now become a settled principle that interest is only payable, where there is an agreement express or implied or where the principal money has been wrongfully withheld or where there is a statute authorising the charging of interest.

The learned Judge next dealt with the prohibition provided in proviso (a) to s. 11 of the Civil Law Act 1956 which says that nothing in s. 11 shall authorise the giving of interest upon interest. The scope of this proviso was dealt with by His Lordship thus:

> The short answer to this submission is that the interest chargeable in this case is not based on the statutory discretion given to the Court under s. 11 of the Civil Law Act, or under any other Act, but upon the agreement of the parties as evinced in Exhs. P2, P3 and P4. Furthermore the language of s. 11 itself leaves no room for doubt that in cases not covered by the section the Court is not prohibited from giving interest upon interest. The fact that the Court is not authorized does not mean that it is prevented from doing so.

On the question of compound interest, His Lordship went on to say at p. 369:

> The sum total of all these cases is that interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use and that interest would be simple or at rests depending upon the circumstances of the case. It is simple interest if the accounting party simply keeps it or actually received such rate, but it is compound if the Court could infer from circumstances that the money was used in the accounting party's business.

In the present case there is no doubt that the parties have agreed that should there be default of any payment of the loan or any part thereof or any interest due therefrom an addition of 5% p.a. over and above the prescribed rate of 14% which subsequently was raised to 15%. There is therefore a clear expressed term in the charge annexure entitling the plaintiff to charge 20% p.a. in respect of the default payment of the loan and the accrued interest. Under the circumstances the proviso (a) to s. 11 of the Civil Law Act 1956 can have no application to the contractually agreed interest rate. At any rate proviso (b) to that section has clearly provided that the said section does not apply to debts where the interest is payable as of right whether by virtue of an agreement or otherwise. Furthermore the plaintiff being a financial institution would most certainly have suffered a loss resulting from the late payments. Had payments been made promptly the plaintiff would have utilised it to give out loan to other person or body of persons and earned interest at rate of more than the 5% additional interest imposed on the defendant.

There is a final point on the issue of interest which neither Counsel of the respective parties had raised in their respective submissions. I observed in the plaintiff's letter of 5 May 1983, approving the defendant's application for an extension of one year with effect from 13 November 1982, the plaintiff also said that the prescribed rate of interest was to be raised by 1% per annum with effect from 13 November 1982. This causes me to ask myself whether the plaintiff could raise the prescribed rate of interest of 14% with retrospective effect. In the circumstances of this case I think it could do so simply because in approving the defendant's application for an extension the plaintiff allowed it on condition that the prescribed rate be increased to 15% as from the date when the defendant should under the charge annexure have repaid the loan. The defendant had accepted such a condition. In any case this condition is not inconsistent with Clause 3 of the charge annexure which says that "the lender shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the chargor ... and such amended rate shall be payable **as from the date specified** in the said notice".

For the reasons stated above the defendant's objection to the plaintiff's application for an order for sale of the land and the apartments erected thereon is dismissed with costs.

I shall now turn to the objections raised by the intervenor. In considering his objections I must remind myself that under s. 5 of the National Land Code 1965 land has been defined to include all things attached to earth. That being so as the land in question has been charged to the plaintiff and it is now seeking an order to sell the charged land it is also entitled to sell the apartments in the building erected on the land. In addition I must also bear in mind the legal principle governing the rights of a purchaser of land pending the registration of the transfer of the land to him under the National Land Code. In *Bachan Singh v. Mahinder Kaur & Ors.* [1956] MLJ 97 Thomson J observed at pp. 97-98:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights in *rem* or personal rights and rights in *rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right as *rem* which is also a right in *personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code.

This observation of Thomson J was cited with approval by our Federal Court in *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] MLJ 225 at 229. In that Federal Court case Gill FJ went on to say at p. 230:

> It would seem clear from what I have said so far that the plaintiff in the present case did not obtain an equitable title to the land by virtue of the sale agreement. What he obtained was an equitable interest of a contractual nature in the land, which he could protect by a restrictive entry in the Land Register. In other words, he acquired a caveatable interest in the land.

Applying the legal principle enunciated in the abovementioned case, all the intervenor has acquired is "an equitable interest of **a contractual nature** in the land" as against the defendant but such interest is no good against the plaintiff chargor. The intervenor's reliance on Clause 30 is misconceived. The sale and purchase agreement executed between the intervenor and the defendant does not and cannot create an incumbrance in the land since the right of the intervenor is an equitable interest of a contractual nature in the land which only affords him a caveatable interest. Such a right does not attach to the land. This proposition is fortified by the definition of 'incumbrance' in *Stroud's Judicial Dictionary* 5th Edn., Vol. 3 at p. 1273 where it is said:

> Incumbrance (1) 'In *Wharton Law Lexican*, I find 'incumbrance' defined as being 'a claim' *lieu* or liability attached to the property'.

The proposition is further fortified by referring to Clause 13 of the charge annexure which says:

> 13. The chargor(s) will not transfer sell charge or otherwise howsoever deal with the said land or any part thereof or any interest therein or make the same subject to any burden charge encumbrance liability or lien whatsoever or make any application for the alteration of the category of land use or for the imposition of any fresh category of land use in respect of the said land or for rescission removal or amendment of any condition or restriction affecting the said land without the written consent of the Lender first had and obtained.

Reading this Clause 13 with Clause 30 it clearly suggests that the incumbrance referred therein relates to an incumbrance in the nature of an easement or entry of a caveat. It is inconceivable that the incumbrance appearing in the two clauses can mean an incumbrance caused by a sale and purchase agreement in respect of the sale transaction of the apartments considering that the plaintiff chargee in granting the loan to the defendant chargor must have known that the defendant required the loan to develop the condominium and repayment of the loan must come from the sales of the apartments to individual persons or companies. If the incumbrance used in Clauses 13 and 30 includes a sale and purchase agreement entered into by the defendant with any individual purchaser, it would have an adverse effect on the right of the defendant as developer to sell the apartments. It would also not be in the interests of the plaintiff to hinder the selling of the apartments for it is only by such sales would it be able to get back the monies loaned to the defendant. A final point that should be taken into consideration is that the intervenor is not a party to the charge annexure and he cannot rely on the said Clause 30 to sustain his right under the sale and purchase agreement.

Quite apart from what have been said before, it is to be noted that the charge of the land was registered some two years before the intervenor purchased the apartments 2A and 2B and the intervenor was fully aware of the charge even before he executed the sale and purchase agreement since it has been stated in s. 2.02 of the recitals therein that "The said land is charged to Supreme Finance (M) Berhad of Supreme Finance Centre of 120, Jalan Pudu, Kuala Lumpur as security for the loan facilities granted to the vendor." That being the case, the plaintiff being a registered chargee, has attained an indefeasible title against the world under s. 340 of the National Land Code. As there is no fraud, misrepresentation or any of the matters stated in subsection (2) of that section, the intervenor's right (if any) is

subservient to that of the plaintiff. This proposition finds support from the judgment of Lord Oliver of Aylmerton in *Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Anor*. [1989] 1 CLJ (Rep) 1 at 5 where he said:

> Even assuming - a point which does not arise in the instant case and has not been argued - that this section might not protect a purchaser or chargee acquiring title with actual notice of the equitable interest of a purchaser, their Lordships are quite unable to see how the interest of a purchaser who has expressly consented to the creation of the chargee's interest could prevail over the registered title. Nor, in their Lordships' opinion, could it furnish a 'cause to the contrary' for the purposes of s. 256.

The only recourse which the intervenor has is to sue the defendant for the recovery of the purchase prices of the two apartments which were bought from the defendant. He has no right to interfere with the plaintiff's present application.

For the above reasons the objections of the intervenor are also dismissed with costs.

Also found at [1991] 1 CLJ 386